MOTION FILED

OCT 5 1994

Nos. 94-236 and 94-

In The

Supreme Court of the United States

October Term, 1994

BABY "RICHARD", also known as BABY BOY JANIKOVA, a minor, by his guardian *ad litem*, Edward J. O'Connell,

and

JOHN AND JANE DOE, Husband and Wife, Adoptive Parents of Baby Richard,

Petitioners,

vs.

OTAKAR KIRCHNER, Biological father of Baby Richard,

Respondent.

On Writ Of Certiorari To The Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* DEBOER COMMITTEE FOR CHILDREN'S RIGHTS, LEGAL ACTION PROJECT OF THE NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD, THE NATIONAL TASK FORCE FOR CHILDREN'S CONSTITUTIONAL RIGHTS, GEORGE H. RUSS IN SUPPORT OF PETITIONERS

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BABY "RICHARD", ALSO KNOWN AS BABY BOY JANIKOVA, A MINOR, BY HIS GUARDIAN *AD LITEM*, EDWARD J. O'CONNELL,
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OTAKAR KIRCHNER,
BIOLOGICAL FATHER OF BABY RICHARD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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The DeBoer Committee for Children's Rights, Legal Action Project of the National Committee for the Rights of the

Child, the National Task Force for Children's Constitutional Rights, and George H. Russ move the Court for leave to file a brief of *amici curiae* in support of Petitioners and as a basis therefor show:

The DeBoer Committee for Children's Rights is a non-profit organization that was organized prior to the final decision in the case of Baby Jessica. In its relatively short history, the DeBoer Committee has organized 30 state chapters. Just this last weekend, the DeBoer Committee hosted its first national conference on children's rights. At least 35 "professionals" and 125 representatives from the state chapters met in Ann Arbor, Michigan to discuss its goals and objectives for the coming year. Although the DeBoer Committee has appeared as *amicus curiae* in numerous state cases involving children's rights, this is its first brief *amicus curiae* in this Court.

The National Committee for the Rights of the Child is a broad based coalition of over 40 national organizations and child advocacy centers working to improve the quality of life of children in the United States. The Legal Action Project of the

National Committee for the Rights of the Child was established in March, 1993. The Legal Action Project has been involved, often appearing as counsel of record or as *amicus curiae*, in cases involving children in Florida, Iowa, Michigan, Missouri, Kansas, Tennessee, South Carolina, California, New Jersey and Colorado.

The National Task Force for Children's Constitutional Rights was founded in 1988 by The Honorable Charles D. Gill, judge of the Connecticut Superior Court, and Dr. Anne Burgess of the University of Pennsylvania. The Task Force is a multidisciplinary organization with membership in all fifty states. The Task Force has appeared as *amicus curiae* in state and federal courts in cases involving the rights of children.

George H. Russ is an attorney in private practice in Florida. He practices in the area of family law and has been a member of various Florida commissions and committees concerned with the rights of children. He is an adoptive father; has represented Kimberly Mays (Twigg v. Mays, S.2d

1993); and has lectured nationally and internationally on issues of children's rights.

In sum, the organizations and professionals requesting permission to file a brief *amici curiae* have identified a long term commitment to protecting the rights of children and thus, it is submitted, have a sufficient interest in this matter.

Because of their expertise and experience in the area of children's law, the applicants can provide the Court with the broader implications of the Illinois Supreme Court's decision. Specifically, the applicants' brief analyzes the present case in the context of the expansion of children's statutory and constitutional rights across the nation.

The applicants present a broad perspective on the implications of the Illinois decision based on their experience in and knowledge of the area of children's rights. Given the federal and state constitutional implications of the present appeal, the Court may benefit from input from all knowledgeable sources. Moreover, the applicants also have had experience as *amici curiae* in other cases dealing with

children's rights.

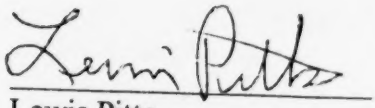
The applicants support the position of the Petitioners that the Illinois Supreme Court improperly ignored Baby Richard's protectible liberty interest in maintaining the relationship he has developed with his adoptive family as guaranteed to him by the Fourteenth Amendment to the United States Constitution.

The applicants have contacted all parties of record in order to obtain the consent of the parties to file a brief of. Permission, by telephone, has been granted by: Lee Ann Lowder, Of Counsel, for Petitioner Baby "Richard", also known as Baby Boy Janikova, a minor, by his guardian *ad litem*, Edward J. O'Connell; Richard Lipshitz, counsel for Petitioners John and Jane Doe, adoptive parents of Baby Richard; and, Thomas Geraghty, counsel for Respondent Otakar Kirchner.

WHEREFORE, the DeBoer Committee for Children's Rights, the Legal Action Project of the National Committee for the Rights of the Child, the National Task Force for Children's Constitutional Rights, and George H. Russ respectfully request

leave to file a brief of *amici curiae* in support of Petitioners.

Respectfully submitted,



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QUESTIONS PRESENTED FOR REVIEW

1. Whether a three year old child, who has lived in a court-sanctioned adoptive home since he was four days old, has a liberty interest in maintaining his filial relationship with his adoptive parents, which cannot be abrogated without a hearing to determine whether it is in his best interests to be placed in the custody of his biological father, whom he has never met.

2. Whether this Court's decision in Stanley v. Illinois requires the Illinois courts to ignore the strong public policy codified in Illinois law, which favors the stability and permanence of adoptions at the consent of unmarried mothers.

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OPINIONS BELOW

The opinions below are attached as appendices to the Petitions of the adoptive parents and the child.

JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement of the adoptive parents.

STATEMENT OF THE CASE

Amici adopt the statements of the case in the Petitions of the child and of the adoptive parents.

REASONS FOR GRANTING THE WRIT

This Court is not being asked to authorize governmental, agency, or private actions that would permit children to be snatched from intact families, regardless of the economic, social, or racial status of those families. Rather, the Court should allow a child to maintain and preserve established relationships with adoptive or de facto parents who have cared for and nurtured the child once the birth family has disintegrated to the extent that relationship

with the birth parent can be shown to be detrimental to the child's best interests.

I. THE ISSUES PRESENTED BY THIS CASE ARE OF CRITICAL IMPORTANCE TO ADOPTED AND ADOPTABLE CHILDREN AND THEIR BIOLOGICAL AND ADOPTIVE FAMILIES.

Thousands of adoptions occur every year, and many more children need adoptive placements.[1] Many other children are being raised by adults other than a genetic parent, without formal adoption. The expansive interpretation given to rights of putative fathers by the Illinois Supreme Court threatens the security of adoption as an alternative for children in need of families. Adult-centered interpretations of the law and biological bias endanger the meaningful familial relationships of children who have not been formally adopted and reduce the viability of adoption. In an era when many believe that there is an excess of procreation and a shortage of parenting, this is not only of personal significance to the individuals involved but of

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1 There are over 500,000 children in foster care, many of them remaining there for lack of adoptive placements.

broad legal and social significance because of the costs attendant upon denying children stable, reliable family relationships.

Cases such as this one will not go away. In addition to the Baby Jessica case [DeBoer v. DeBoer, 509 U.S. ___ (1993)] and this one, a similar unwed father adoption case was argued before the New Mexico Supreme Court this spring and is awaiting decision, and the Arizona Supreme Court decided two such cases this summer. These cases are reaching inconsistent results based at least in part on divergent understandings of this Court's decisions concerning the rights of unwed fathers. The Illinois Supreme Court focused on Stanley v. Illinois, 405 U.S. 645 (1972) and took a broad view of the rights of unwed fathers. The Arizona Supreme Court, focusing instead on Lehr v. Robertson, 463 U.S. 248 (1983) - which the Illinois Supreme Court ignored - reached an opposite result, and stressed the burden of unwed fathers to establish their entitlement to parental rights. Matter of Pima County Juvenile

Severance Action, 876 P.2d 1121, 1133 (Ariz. 1994) The Illinois Supreme Court decision is inconsistent with this Court's most recent rulings and the predominant understanding by the states of those rulings.

Conflicting interpretations and uncertainties about the impact of this Court's decisions about the rights of unwed fathers threaten the security of adoption as an alternative for children in need of families.

Most importantly, this Illinois Supreme Court decision unambiguously ignores the child's rights, needs and interests. It does so without consideration of, or even mention of, the holdings of this Court that a child is a 'person' protected by the Constitution. By totally leaving the child out of the equation, the decision propagates the traditional adult-centered perspective within family law which myopically analyses only the rightness or wrongness of conduct by the competing adults and has not incorporated the fundamental principle that a child is a person. The manifest

injustice to this child which will occur if he is snatched from the only family he has ever know, is ignored in an optical-illusion-like focus on highly disputed facts presented in highly charged ideological terms, such as evoking the spectre of the State breaking up natural families and taking children from poor and/or ethnic citizens. The optical illusion naturally appears then disappears absent a fully contextualized understanding. (In this case the Appeals Court affirmed the trial court; then the Supreme Court reversed; then two justices who voted to reverse joined in favor of rehearing.) The anchoring principle of including the child as a person in the constitutional analysis prevents the outcome from being determined by which ideological eye is cast upon the matter.

Amici submit that there is a compelling national interest in grant of certiorari so that this Court can consider, in a fully contextualized way, the extent and consequences of the treatment of children as property and not persons in this and similar cases.

II. BABY RICHARD HAS A FUNDAMENTAL LIBERTY INTEREST IN MAINTAINING THE RELATIONSHIP HE HAS DEVELOPED WITH HIS ADOPTIVE FAMILY, THE ONLY FAMILY HE HAS LIVED WITH FOR THE ENTIRE THREE AND A HALF YEARS OF HIS LIFE, WHICH THE ILLINOIS SUPREME COURT IMPROPERLY IGNORED

More that 25 years ago this Court stated: "Whatever may be their precise impact, neither the 14th Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 US 1, 13 (1967). The Court held that children "are 'persons' under our Constitution" and are "possessed of fundamental rights which the State must respect." Tinker v. Des Moines School District, 393 US 503, 511 (1969).2

The Court has not determined the implications of this fundamental principle as it bears on the protection due children's

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2 As other of this Court's decisions hold, the fact that a person may not be able to act or choose autonomously is not dispositive, and "competence" in the usual adult sense is not a prerequisite to possession of constitutional rights. City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); see also Cruzan v. Director, Missouri Dept. of Health, 497 US ____, 111 L.Ed.2d 224 (1990).

relationships with their functional families.[3] This case squarely presents that issue. Amici believe that because a child is a 'person', it is relevant, in deciding who Richard's parents are, that he has lived with his adoptive parents for all but the first four days of his life, and how loss of that family could affect him.

A. Children have a liberty interest in continuity of relationships

As a "person" this child is protected by the Fourteenth Amendment to the United States Constitution. Among the fundamental elements of personal liberty protected by the 14th Amendment is the freedom of intimate association. Roberts v. United States Jaycees, 468 U.S. 609, 618-620 (1984) (Bill of Rights, in order to secure

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3 An experienced Connecticut state court judge recently wrote,

> It is ironic that although corporations in the United States have long been held to be "persons," and thus are eligible for constitutional protection, the extent to which children, as individuals, have comparable constitutional rights is still not entirely clear.

Gill, Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?, 17 Ohio Northern L.Rev. 543, 548 (1991).

individual liberty, shelters highly personal relationships from unwarranted state interference). This includes protection of family relationships, of which the Court said: "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." Roberts, 468 U.S. at 618-620. Roberts does not present biological connection that is the key to constitutional protection of intimate relationships.

The 14th Amendment protects a child's as well as an adult's family relationships, and the companionship and care which the family provides for a child:

> We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we

accord to the parent-child relationship. . . .

> When a child claims constitutional protection for her relationship with a parent, there is no custodial interest implicated, but only a companionship interest. This distinction between the parent-child and the child-parent relationship does not, however, justify constitutional protection for one but not the other. We hold that a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest.

Smith v. City of Fontana, 818 F.2d 1411, 1418-1419 (9th Cir. 1987)(emphasis in original). The "companionship" interest described in Smith v. City of Fontana is clearly defined by the content of the relationship, not its genetic origin. It stems from nurture, not participation in the physical process of procreation.

If anything, family relationship is even more critical to a child than to an adult because of the vulnerability and dependency of a child. Parent figures are not fungible for children; adults are not interchangeable in the role of parent. Contrary to the Illinois Supreme Court's "bounce back" theory, stability

of parental relationships is critical to children's well-being.4

In Smith v. OFFER, 431 U.S. 816 (1977), the Court refused to limit its conception of 'family' to biological relationsips. The Court declined to decide the constitutional status of foster parents but acknowledged that although the usual understanding of "family" implies biological realtionsips, such "biologial relationships are not exclusive [determinants] of the existence of a family," noting that the legal protection of the husband-wife relationship is not based on shared blood.

The question of whether children have a constitutionally protected liberty interest in

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4 The fundamental developmental significance to a child of a long-term nurturing relationship with an adult is expressed metaphorically in the children's book, The Velveteen Rabbit:

> "What is REAL?" asked the Rabbit one day, when they were lying side by side near the room. "Does it mean having things that buzz inside you and a stick-out handle?"
>
> "Real isn't how you are made," said the Skin Horse. "It's a thing that happens to you. When someone loves you for a long, long time, not just to play with, but REALLY loves you, Then you become Real."

attachments to functional family members to whom they are not related by blood was left open in Smith v. Organization of Foster Families, 431 U.S. 816, 847 (1977) ("[foster children's] claim to a constitutionally protected liberty interest raises complex and novel question [but] it is unnecessary for us to resolve those questions definitely in this case"). However, the Court pointedly noted:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural the foster family should have the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Smith v. OFFER, 431 US at 844 (emphasis added).

A child is a person. When a functional family has the same place in the emotional life of the foster child and fulfills the same socializing functions as a "natural" family, then the child's relationship with that family should have the same protection as it would with a "natural" family.

An adoptive child's interests are far stronger than those of the foster children in Smith. The relationship between the adoptive parents and adoptive child is based on love, not contract and profit, and is intended by all concerned, including the state, to create a permanent parent-child bond. Thus it is even more like the relationships to which this Court has extended the greatest protection.

Where children have been placed with persons other than their biological parents for long periods of time, crucial bonds ususally form between them that cannot be distrubed without the same harm that comes from taking children from loving biological families. Goldstein, et.

al., BEFORE THE BEST INTERESTS OF THE CHILD (1979).

Adoption is the legal process by which a non-biological parent-child relationship is created; parenting is the social process. The legal process can be reversed, but the social process cannot. For Baby Richard, the process began the day he was placed with the Does. Children do not wait for a court to tell them who their parents are. To a child, whose ability to survive and grow physically and emotionally depends on having needs met by adults, it is adult conduct and not adult credentials that count. Legal principles that link protection of children's relationships to formalities and credentials in effect require a child to check birth certificates, marriage licenses and HLA test results before risking forming attachments or risk the consequences of later being determined to have bonded with the 'wrong" parents!

Respecting a child as a person requires respecting the child's relationships with those

who reliably meet that need. It requires protecting their relationships with people who have served as parents for them, for purposes of determining custody if not for purposes of determining parental rights.

At least one federal court has recognized that, after one year in foster care, the emotional ties between the foster parent and the foster child may have matured to such a degree that they are deserving of legal and constitutional protection. Brown v. County of San Joaquin, 601 F.Supp. 653, 662 (1985)(foster family relationship was similar to other familial relationships held by the Supreme Court to be entitled to constitutional protection, where the foster parent-foster child relationship had the same content as a healthy biological parent-child relationship). The court said, "Reality controls; the emotional sustenance and enrichment, the very sense of self, derived from an intimate relationship with one's parent or one's child cannot be discounted by the niceties of the relationship's

creation."5 See also In Re Jasmon O., Cal. Supreme Court No. S030556 (opinion filed 9/2/94) (children with long-standing relationships with non-biologically related adults develop certain constitutional rights which are protectable).

The Florida Supreme Court recently held that the nature of the relationship between a child and foster parents created a fundamental due process liberty interest in the foster parents such that they were entitled to notice and a meaningful opportunity to be heard in adoption proceedings initiated by the child's maternal grandparents. In re: Adoption of a Minor Child, 593 So.2d 185 (Fla. 1991). The court effectively adopted the concept that the closer a relationship between a child and an adult

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5 The court went on to say, "No one can instruct the infant foster child that his foster parent is not his real or natural parent; no one can diminish the infant foster child's feelings toward his foster parent and cause them to be distinguished from the feelings of an infant child to his natural parents." The court found that the State had created an expectation of an enduring relationship by leaving the child in foster care longer than statutorily permitted, and therefore allowed a fundamental liberty interest to come into existence by allowing a de facto parent/child relationship to develop.

becomes to that of a normal child/parent relationship, the greater the constitutional protection that should be provided to that relationship, regardless of the biology involved. 6

Interfering with the child's family relationship at the expense of his well-being would violates the child's rights and treats him and his rights as constitutionally less signficant than the birth father and his rights. The child is reduced, thereby, to an instrument to serve the birth father's interests. If the courts below wrongly interfered in the father's right to raise his child, that is not properly rectified by now having the state interefere in the child's life by depriving the child of his family and causing him emotional trauma, without a demonstration that this is in fact in his best

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6 See also Berhow v. Crow, 423 So.2d 371, 374 (Fla. App. 1982)("[A]s the nature of the foster parent/child's "familial relationship" becomes closer and stronger, so as to approach the level of the relationship between natural parents and their offspring, so too do the rights of the foster parents to preserve that relationship.")

interests. A hearing is necessary to determine the child's best interests at the time that the State attempts to disturb the child's world.

When faced with resolving a conflict between people who all have interests of constitutional magnitude, a court should "consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992). Instead, the Illinois Supreme Court's opinion treated only the biological father as having rights while the child was to being subject to being literally "repossessed" by a biological parents in the same manner as property, capable of ownership, without independent human rights.

In Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277 (1976), the New York Court of Appeals rejected the idea that a third party acquires "squatter's rights" in a child through long-term custody, but recognized that the child is a person and acquires rights in such a situation.

In Bennett a biological mother petitioned the court to obtain custody of her child from the child's custodian. The New York court upheld the presumption of parental custody but unanimously held that if "extraordinary circumstances" exist the lower court must examine into the child's best interests rather than simply applying a parental preference. Id., 356 N.E.2d at 280. The court held that one "extraordinary circumstance" triggering the requirement of considering the child's interest is when "the child [has been] so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child." Id., 356 N.E.2d at 284. The court noted that over time there had been a "shifting of emphasis" in the case law in this area. "This shifting reflects more the modern principle that a child is person, and not a subperson over which the parent has an absolute

possessory interest." Id., 356 N.E.2d at 281 (emphasis added).

Recently courts in several states, in cases of disputed paternity, have required the holding of a hearing to determine if blood testing is in a child's best interests when there is a presumed parent. These decisions reflect recognition that a necessary implication of treating a child as a "person" is respecting that child's functional family rather than privileging biology alone.

> Prior to ordering a blood test to determine whether the presumed parent is the biological parent, the district court must consider the best interest of the child, including physical, mental, and emotional needs. The shifting of paternity from the presumed father to the biological father could easily be detrimental to the emotional and physical well-being of the child. Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed.

Matter of Marriage of Ross, 783 P.2d 331, 338-339 (Kan. 1989) (emphasis added); Department of Health & Rehabilitative Serv. v. Privette, 617 So.2d 305 (Fla. 1993)("it seldom will be in the children's best interest to wrench them away

from their legal fathers and judicially declare that they now must regard strangers as their fathers. The law does not require such cruelty towards children.").7

Baby Richard has a real family; the Does are real parents because they parent him. He is entitled to protection of that relationship as much as adults are entitled to protection of their intimate relationships from State interference.

B. Children have a liberty interest in freedom from harm that may limit a fit parent's custody rights.

"Restoring" this child to his birth father would destroy the only family he knows. No matter how fine the birth father would be, substituting him for the "mommy" and "daddy" that the child knows and depends upon would come at a huge price to the child. The loss of family this child faces entails tremendous loss

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7 Cf. Michael H. v. Gerald D., 491 U.S. at 124 n.4 (plurality opinion) (liberty interest of a putative father cannot be evaluated in isolation, without reference to its effect on the other members of the family he seeks to intrude upon).

of trust and emotional security. This Court has recognized that harm to children's mental and emotional development involves injuries that cannot be reversed or remedied. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1332 (1980) (irreparable harm to children of not being able to attend school; recognizing that developmental, emotional and behavioral damage to children cannot be repaired by a future legal remedy). The unique nature of the threatened harm to this child far outweighs the possible detriment to the adult parties, as recognized by the priority historically accorded to protecting vulnerable children. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944); Hammer v. Dagenhart, 247 U.S. 251 (1918)(Holmes, J., dissenting).

The child has an interest in being protected from harm whether the harm comes from physical abuse or from severing his relationship with his long-term care givers. In Parham v. J.R., 442 U.S. 584 (1978), the Court noted that,

regardless of the state's respect for parental authority, and parent's right to decide what is best for the child, "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Id. at 604 (emphasis added).

Where legal recognition is withheld in situations involving established psychological and emotional relationships between children and adults they consider their parents, the forcible interruption of these relationships does not differ from those caused by separation from, or death of, natural or adoptive parents. Goldstein, et al, BEYOND THE BEST INTERESTS OF THE CHILD 27 (1973).

Due Process requires that Richard be given a hearing on whether removal from the Doe family is in his best interest and that he not be deprived of his safety and happiness but for the most compelling reasons. Interfering with the child's family relationship with the Does at the expense of his well-being would treat the child

and his rights as constitutionally less significant than the birth father and his rights, reducing the child to an instrument to serve the birth father's interests. The child is entitled to a hearing on his claim of irreparable harm.

A foreign court which comes from the same legal tradition in respect to family law as this country has ruled in the interests of protecting the child in a situation like this. In King v. Low, 1 R.C.S. 87, 105 (1985), Canada's highest court traced the development of English and Canadian law from child-as-chattel-of-genetic-parents to the view that "the Court in questions of contested custody, including contests between a natural parent an adoptive parents, must consider the welfare of the child the predominant factor and give it effect in reaching its determination." The Court approved the words of the trial court:

> [T]he child has by now established a strong bond instead with the adptive parents, who are as a result in relation to the child as if they were its natural parents. . . . It goes to the very roots of the child's experience of its world since

> that time. It would be extremely traumatic for the child now to be uprooted from its present home and to be returned to a stranger to it, even if that stranger is its natural mother. Though lawful, such an uprooting would do serious and perhaps permanent psychological damage to the child for it would be destructive of the truly close human bonds which it now has and would impair its prospects of functioning as a healthy human being as it grows older.

King v. Low, 1 R.C.S. at 104. The court said that where the parent-child bonds are with an adoptive rather than biological parent, "the court must perforce give recognition to the facts of the case accordingly. To do otherwise would be to substitute an empty formula for the substance which the law must embody and express." Id.

State court decisions construing biological fathers' rights recognize that a child's right to be protected from harm requires that the issue of custody be determined separately from the biological parent's rights if the child is placed at risk by disruption of a long-term adoptive placement, even where the adoption is overturned. See, In re Appeal of H.R., 581 A.2d 1141 (D.C. 1990); In re M.N.M., 605 A.2d 921

(D.C. 1992); Adoption of Kelsey S., 823 P.2d 1216, 1238 (Ca. 1992); Sorentino v. Family & Children's Society of Elizabeth, 378 A.2d 18, 19-20 (N.J. 1977).

In the "Baby M" surrogate parenting case the Supreme Court of New Jersey rejected the idea that the child should be made to suffer in order to correct wrongs done to adults.

> Our declaration that this surrogacy contract is unenforceable and illegal is sufficient to deter similar agreements. We need not sacrifice the child's interests in order to make that point sharper. . . . We disagree with the premise ... that in determining custody a court should decide what the child's best interest would be if some hypothetical state of facts had existed. Rather, we must look to what those best interests are, today, even if some of the facts may have resulted in part from legal error. The child's interests come first: we will not punish it for judicial errors, assuming any were made.

In the Matter of Baby M, 537 A.2d 1227, 1257-1258 (NJ 1988) (emphasis by the court).

Legal commentators have argued that remedies for violations of a parent's constitutional right to the custody of a biological child must be sensitive to the human dignity and constitutional rights of the children involved.

> Returning the boy to his natural father [after a wrongful adoption was vacated] follows the same logic as letting the defendant go free "because the constable has blundered." Whatever the soundness of such a policy for effectuating the prohibition against unreasonable searches and seizures, it is improper in the custody context because it imposes the cost of the state's errors on children who have no hand in creating either the particular situation or the laws governing it.
>
> Instead of awarding the child as the victor's prize, an appropriate alternative remedy would be to award money damages to the wronged parent. . . . money damages would provide a more powerful incentive for the state to change its procedures. By contrast, taking the child from the adoptive parents costs the state nothing.

Tremper, Respect for the Human Dignity of Minors: What the Constitution Requires, 39 Syracuse L.Rev. 1293, 1334-1335 (1988).

C. Bringing legal practice regarding children into line with principle.

It is now more than twenty-five years since this Court held that children are "persons" and have constitutional rights. That it was necessary to so hold evidences children's past status as less than "persons." The real issue in this case is whether and how to incorporate that "person" principle into practice.

Parental rights are unique among the rights protected by the 14th Amendment, because they involve the right to control another human being.8 Children need parents. However, if the State reinforces parental prerogatives when such prerogatives are demonstrably contrary to the child's well-being and ignores the child's rights, parent-child bonds become bonds of oppression. When the State privileges the biological parent's genetic contribution over the child's familial relationships with a functional, though non-biological, family, to the child's detriment, the parent's "liberty"

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8 Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), still much cited in defense of parents' rights, are grounded in notions of children as property. Meyer and Pierce were "authored and joined by the Court's most inflexible laissez-faire conservative and grounded on economic substantive due process precedents." Woodhouse, "Who Owns the Child?" Meyer and Pierce and the Child as Property, 33 William & Mary Law Review 995, 1042 (1992). "[I]n Meyer the court vindicated the 'liberty' to control another human being . . ." Id. at 1099 n.577. As Governor Pierce of Oregon said during this Court's consideration of Pierce, "[I]t is a strange perversion of the word 'liberty' to apply it to a right to control the conduct of others." Quoted in Woodhouse, supra, at 1042.

becomes a lack of liberty for the child and the State treats the child as property.

This case is part of a necessary paradigm-shift in the law from children-as-chattel to children as rights-bearing people. The constitutional principles underlying this shift are well established. Courts, relying on tradition, have failed to apply them consistently to children. To the extent that case law reflects ideas of children-as-chattel instead of children-as-persons and has failed to consistently apply basic constitutional principles to children, the case law is due for a change.9/ Our legal concepts constantly

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9 It is not surprising that there is little case law addressing the child's rights in matters such as marriage dissolutions involving custody issues. These are treated as disputes between adults; children are usually not represented in these disputes, and "without counsel, rights not only fail to be vindicated, they fail to be created." Kleinfeld, The Balance of Power Among Infants, Their Parents, and the State, 4 Fam.L.Q. 320, 324 (1970). "The paucity of substantive law concerning the rights of minors in such matters as divorce, custody, juvenile delinquency, and mental health commitments may be attributable to the lack of independent representation in such proceedings." Genden, Separate Legal Representation for

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change to reflect the growth of society's values, and this change is proper. As the 11th Circuit pointed out in extending the protection of the fourteenth amendment to children in foster care:

> The fourteenth amendment, like the eighth amendment, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 US 86, 101 (1958).

Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987).

In breaking with common law tradition the Court will act consistently with well recognized fundamental constitutional and human rights principles and discard those portions of tradition which are inconsistent with the principles. Recognizing a child's right to protection of familial relationships recognizes the human dignity of minors.

This paradigm shift in the legal status of children is similar to other paradigm shifts in

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9(...continued)
Children: Protecting the Rights and Interests of Minors in Judicial Proceedings, 11 Harv.C.R.-C.L. Law Rev. 565 n.2 (1976).

this nation's history. It is at once a major change and yet at the same time simply a more consistent application of our professed principles.

At this Nation's founding, the Founding Father proclaimed it as "self-evident" that "all men are created equal," and yet felt it obvious that African American men were "different," such that a black man had no rights which a white man was bound to respect (in the infamous words of the Dred Scott decision). It was also obvious that women, of any race, were "different" and therefore could be denied the rights guaranteed to "all persons" - such as the right to vote.10/

African Americans, women and children have in common the history of being treated essentially as property and as exceptions to the social contract upon which our founding

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10 Shortly after ratification of the 14th Amendment, which promised all citizens equal protection of the laws, the U.S. Supreme Court upheld an Illinois prohibition against women becoming lawyers. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

documents declared this nation to be based.11/ In each case, the articulation of the principle that members of each group were constitutional "persons" came well before society in general and the legal system actually treated them as such.

Just as for African Americans and women, steps toward progress for children have not come easily or without protest and resistance. For example, we now take for granted the child labor laws passed during the early twentieth century. At the time, however, some religious leaders and conservative political forces opposed such laws as unwarranted governmental interference in the

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11 One scholar notes that "from Roman times to the mid-nineteenth century [children] were treated as something akin to property and had rights which might be characterized as falling somewhere between those of slaves and those of animals." Cohen, Relationships Between the Child, the Family, and the State, in PERSPECTIVES ON THE FAMILY 293 (M. Bayles, R. Moffit & J. Greie, eds. 1990). American attitudes toward the treatment of children did not begin to change until the end of the nineteenth century. Hart, From Property to Person Status: Historical Perspective on Children's Rights, 46 Am.Psychologist 53 (Jan. 1991). Even then, the Society for the Prevention of Cruelty to Animals was founded before a similar society to protect children.

economy and the privacy rights of the family. See Hammer v. Dagenhart, 247 U.S. 251 (1918); Mnookin, CHILD, FAMILY AND STATE 646-68 (1978).

"Tradition" could not sanctify slavery or segregration or disenfranchisement of women or discriminatory treatment of children born out of wedlock. It cannot sanctify treatment of children as chattel subject to repossession by absentee owners claiming genetic title. The claims raised by this child cry out for a hearing.

III. STANLEY V. ILLINOIS DOES NOT REQUIRE THE ILLINOIS COURTS TO IGNORE THE STRONG PUBLIC POLICY CODIFIED IN ILLINOIS LAW, WHICH FAVORS THE STABILITY AND PERMANENCE OF ADOPTIONS AT THE CONSENT OF UNMARRIED MOTHERS

The Illinois Supreme Court's decision that the biological father's parental rights were terminated improperly begs the question of whether he had parental rights. The court relied on Stanley v. Illinois, 405 U.S. 645 (1972), and read it expansively. Stanley must be read in context with subsequent opinions of the U.S. Supreme Court regarding unwed fathers.

These cases look at family relationships in functional, not solely biological, terms and are more consistent with the fundamental principle that the children involved are constitutionally protected persons, too, and more consistent with contemporary understanding of the effect on children of judically switching fathers on them.

In Quilloin v. Walcott, 434 U.S. 246 (1978), this Court upheld a decision denying legitimation and permitting an adoption over the objections of the unwed biological father, even though he had maintained contact with the child and brought him gifts, on the ground that it was in the child's best interest:

> Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'

Quilloin v. Walcott, 434 U.S. at 255. The child's interest in being adopted into his

already existing family unit prevailed over requirement for proof of the father's "unfitness", and the Court upheld a Georgia statute permitting adoption of an illegitimate child without the natural father's consent unless the father had obtained a paternity ordery.

The liberty interest entitiled to constitutional protection is "the relationship of love and duty in a recognized family unit." Lehr v. Robertson, 463 U.S. 248, 257 (1983). In Lehr the Court rejected an unwed father's claim that he had an absolute right to notice and a hearing before his child could be adopted. The court found that the state did not violate the father's rights to due process and equal protection by failing to give notice of the adoption proceedings, even though the state had actual knowledge of his existence and whereabouts. The Court reasoned that the putative father could have guaranteed that he would receive notice of any adoption proceedings by mailing a postcard to New York's putative

father registry. He did not avail himself of that opportunity, nor did he seek to establish his paternity until after the mother remarried and her new husband had adopted the child. The Court saw a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility," and said that '[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Lehr, 463 US at 260-261. In Lehr the Court emphasized that "the rights of the parents are a counterpart of the responsibilities they have assumed." Id., 463 U.S. 257.12

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12 Professor Homer H. Clark, Jr., author of the much-cited treatise LAW OF DOMESTIC RELATIONS (2d ed. 1987), has contrast the adult-centered (father-centered) Stanley with the more child-friendly Lehr:

> The most striking aspect of Stanley is the Supreme Court's silence on the interests of the children as well as the effect of the decision on adoptions, and thus on children's welfare generally. . . . The opinion concentrated exclusively on the rights of the father, treating the children more like inanimate objects than persons. . . . . Lehr at last recognized that the

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> When an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in prersonal contact with his child acquires substantial protection under the Due Process Caluse . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . .

Lehr, 463 U.S. at 261. "If he fails to [grasp the opportunity], the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." Lehr, 463 U.S. at 263.

One way a biological father who is frustrated by the birth mother can "grasp the opportunity" is to file a paternity suit. The Respondent said he did not file a paternity action because he did not know the law. The trial court properly held that ignorance of the law is no excuse. See Lehr, 463 U.S. at 265 (biological father's ignorance of putative father registry not dispositive). Such a

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12(...continued)
state's interest in establishing workable adoption procedures was based on the needs of children, especially out-of-wedlock chidlren, for secure adoption placements. Clark, Children and the Constitution, 1992 Univ. of Ill. Law Rev. 1, 20-22 (1992).

conclusion is consistent with recognizing the child's personhood and need for prompt resolution of family status, independent of the biological father's reasons for not acting.

The Respondent did not fall into any of the categories of men entitled to notice of a pending adoption in the statute upheld as Constitutional by this Court in Lehr - i.e., the State was not constitutionally required to ensure notice.

A biological father is not automatically constitutionally entitled to custody or visitation. In Michael H. v. Gerald D., 491 U.S. 110, 130 (1989), the Court upheld the right of California to bar an admitted biological father from proving his paternity of a child born during the mother's marriage to another man, even when he had established a relationship with the child. The Court said,

> [Appellant] reads the landmark case of Stanley v. Illinois, and the subsequent cases of Quilloin v. Walcott, Caban v. Mohammed, and Lehr v. Robertson, as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship . . . . We think that distorts the rationale of

> those cases. As we view them, they rest not upon such isolated factors, but upon the historic respect -- sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family.

Michael H., 491 U.S. at 123 (plurality opinion)(citations omitted).

Thus, an unwed father of a newborn does not start off in the same constitutional position as either a man married to the child's mother or an an unwed father who has actually parented his child(ren) as had the unwed father in Stanley v. Illinois. He has to affirmatively establish his status, and determination of his status does not occur in a vacuum without consideration of other people's rights.

Because children need functional parents, and parental rights, quite reasonably, are difficult to terminate once they exist, it is also reasonable, for the child's sake and society sake, to set hurdles that must be cleared to establish parental status and entitlement to parental rights. The legislature could decide that unwed fathers should unequivocally establish their commitment to

assume responsibility for the child. If they do not, the child should have an opportunity with another family.

An unwed father who does not unequivocally demonstrate a commitment should not be able to maintain a form of absentee ownership of a child based on genetic title that gives him a veto power over adoption and forecloses other custody options for the child, thus depriving the child of the opportunity for a real family. Recent state court decisions construing Lehr reject an adult-centered focus on a biological father's reason for delay and instead focus on the child's need for prompt certainty.

"[T]he timing of the father's action is the 'most significant' element in determining whether an unwed father has created a liberty interest [citation omitted]." Robert O. v. Russell K., 80 N.Y.2d at 264, 604 N.E.2d at 103.

> To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevent. Promptness is measure in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor

> punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability.

Id., 604 N.E.2d at 103-104.

> The ultimate question must be whether the father has, in fact, created a relationship. Even if this father had taken all possible steps to bond with his child and failed, Lehr's message is that to protect his interest, and the child's well-being, he must do more. For in the child's eyes, a valiant but failed attempt to create a relationship means little. Severing long-established bonds with others is equally harmful to the child, regardless of whether the father first attempted to create a relationship. Therefore, if the father's parenting attempts are unsuccessful, he must rapidly turn to legal recourse so that the child may obtain a final placment as quickly as possible. In this area, as in few others, there must be prompt recourse to the law.

Matter of Pima County Juvenile Severance Action, 876 P.2d 1121, 1133 (Ariz. 1994). The court stressed "prompt finality" as the paremount goal "as a matter of matter of sound jurisprudence," because "[o]therwise a young child languishes in limbo - surrendered by the mother, unclaimed by the father, and bonding with others - from which the law cannot extricate the child without lengthy proceedings compounding the harm." Id., 876 P.2d at 1132.

When Mr. Kirchner's answer in the adoption proceeding was stricken because he had not established paternity, he did not file a paternity action for more than three months - although he was fully on notice that his claim to parental status was not recognized and that any potential parental rights were in danger, he was represented by counsel, and he knew the child was bonding with the adoptive parents. Whether or not that delay, in the face of full notice of the stakes, establishes unfitness under subsection 1(D)(n) of the Adoption Act, it certainly supports the lower courts' determinations that his inaction in the first 30 days after the child's birth demonstrates lack of concern rather than confusion caused by the birth mother.13 It is not the kind of prompt,

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13 Likewise, the Court of Appeals points out that Mr. Kirchner's counsel (like the Does' counsel) did nothing to urge the courts to speed hearing and review of the adoption proceeding. Such efforts might not have succeeded, of course; but, the point is that they weren't made. There did not seem to be a sense of urgency commensurate to what was at stake and to what the birth father said his feelings were.

definitive action required by Lehr and a growing number of state courts.

CONCLUSION

Due respect for the personhood and human dignity of children - the characteristics that distinguish them from property which can be shunted about depending on claims of ownership - requires that we respect the functional family relationships of children. Children have only one childhood in which to accomplish all the tasks and meet all the challenges involved in growing up. They do not go into suspended animation while adults debate whether to fulfill their duties toward children or whether a child is bonding with the "wrong" family.

The decision of the Illinois Supreme Court only balanced, weighed, and judged the interests of contending adults and never once acknowledged the child as having any interest worthy of consideration. It treated the child as the property of his biological parents. It demonstrates and reinforces precisely the "Dred Scott mentality" which the Court of Appeals

optimistically believed to have been eliminated from the law. The U.S. Constitution, with its emphasis on the human dignity of all people, requires more.

The Illinois court's fear that consideration of the best interests of the child would mean that the decision based on wealth or other unacceptable criteria applied to contending adults to identify the "better parent" is wholly misplaced. The routine standard for determining custody between biological parents and third parties is the presumption that the birth parents are fit, able and appropriate to raise their child. To acknowledge the human dignity of the child requires, however, that in two extraordinary circumstances the presumption in favor of birth parent custody give way to use of the best interests of the child standard for determining custody:

a. Unfitness of the biological parents.

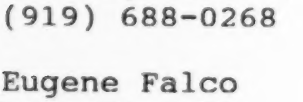
b. Long-term placement of the child with non-biological caretakers, with whom the child has formed a parent-child bond, such that removal of the child threatens grave harm to the child.

Baby Richard's case fits under both principles. Baby Richard, independent of any rights of the adoptive parents, is entitled to a hearing at which his best interest is the touchstone for making the custody determination. Otherwise, Baby Richard is merely a piece of property.

According, amici respectfully request that this Court grant the petitions of the adoptive parents and the child for a writ of certiorari.

Dated: October 4, 1994

Respectfully submitted,



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